

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SEAN RYAN #787263,

Plaintiff,

v

NO. 2:19-cv-12286

HON. VICTORIA A. ROBERTS

MICHIGAN DEPARTMENT OF
CORRECTIONS; STATE OF
MICHIGAN; LINDSEY; KISOR;
ELUM; COREY-SPIKER;
PATIZIKA and KATHLEEN
PULFORD,

MAG. ANTHONY P. PATTI

Defendants.

Sean Ryan #787263

In Pro Per

G. Robert Cotton Correctional
Facility

3500 N. Elm Road
Jackson, MI 49201

Joseph Y. Ho (P77390)

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State of Michigan, Lindsey, Kisor,
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**MDOC DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
ON THE BASIS OF EXHAUSTION**

Defendants Michigan Department of Corrections (MDOC), State of
Michigan, (former) Warden Kevin Lindsey (retired), Library Supervisor
Hatatu Elum, Deputy Warden Tiffani Kisor, Resident Unit Manager

(RUM) Teresa Corey-Spiker, and Health Information Manager Kathleen Pulford (together, MDOC Defendants), through counsel, bring this motion under Fed. R. Civ. P. 56(a), and ask the Court to enter an order granting summary judgment in their favor and dismissing the unexhausted claims against them, based on the grounds set forth in their accompanying brief.

Concurrence has not been sought in this matter because nonmovant is an incarcerated prisoner proceeding pro se. E.D. Mich. LR 7.1(a)(2)(C).

Respectfully submitted,

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Attorney General

s/ Joseph Y. Ho
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Dated: September 21, 2021

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on September 21, 2021 I electronically filed the *foregoing document(s)* together with this *Certificate of Service* with the Clerk of the Court, which will provide electronic copies to counsel of record and a hard copy of same was placed in First-Class Mail, postage paid, plainly addressed as follows:

Sean Ryan #787263

In Pro Per

G. Robert Cotton Correctional Facility

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/s/ Joseph Y. Ho

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**MDOC DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT ON THE BASIS OF EXHAUSTION**

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CONCISE STATEMENT OF ISSUES PRESENTED

1. 42 U.S.C. § 1997(e)(a) requires a prisoner-plaintiff to exhaust properly all administrative remedies against all defendants prior to filing a suit under 42 U.S.C. § 1983. Ryan failed to properly exhaust administrative remedies on his claims against MDOC Defendants. Should this Court grant summary judgment for MDOC Defendants, and dismiss them from this suit?

Plaintiff's Answer:	"No"
MDOC Defendants' Answer:	"Yes"

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

1. Exhaustion: *Woodford v. Ngo*, 548 U.S. 81, 90, 92 (2006) (holding that the PLRA requires “proper exhaustion of administrative remedies,” which “means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)”).

STATEMENT OF FACTS

Plaintiffs Sean Ryan, a prisoner under the custody of the Michigan Department of Corrections (MDOC), brings this lawsuit challenging the conditions of his confinement at the G. Robert Cotton Correctional Facility (JCF) in Jackson, Michigan. (ECF No. 1.) Ryan brings First and Eighth Amendment, Americans with Disabilities Act (ADA), the Rehabilitation Act (RA), and Michigan's Elliot-Larsen Civil Rights Act claims arising out of events which allegedly occurred at JCF between January 7 and July 9, 2019. (ECF No. 6.) Specifically, Ryan alleges that JCF staff deprived him of his right of access to the courts by denying his requests for a memory typewriter or a laptop and printer, large amounts of typing and carbon paper, and copies of his medical records; that they retaliated and conspired against him; and that they subjected him to unnecessary pain and suffering by preventing from pursuing a complaint about his medical conditions. (*Id.*) Ryan filed his complaint on August 2, 2019. (ECF No. 1.) MDOC Defendants bringing the instant motion are MDOC, State of Michigan, (former-)Warden Kevin Lindsey (retired), Library Supervisor Hatatu Elum, Deputy

Warden Tiffani Kisor, Resident Unit Manager (RUM) Teresa Corey-Spiker and Health Information Manager Kathleen Pulford.

Pursuant to MDOC P.D. 03.02.130, “Prisoner/Parolee Grievances,” within two business days of a grievable issue, a grievant must attempt to reconcile the issue with the staff member involved; the grievant must then file a Step I grievance within five business days. (Ex. 1, MDOC P.D. 03.02.130, “Prisoner/Parolee Grievances,” (effective date 07/09/2007); Ex. 2, MDOC P.D. 03.02.130, “Prisoner/Parolee Grievances,” (effective date 03/18/2019).) To exhaust administrative remedies through the grievance process, a prisoner must pursue grievances through Step III of the grievance process. (*Id.*) A prisoner’s Step III Grievance Report tracks all of the grievances that had been filed at Step III. (Ex. 3, Ryan’s Step III Grievance Report.) Ryan’s Step III Grievance Report shows that he had pursued, through Step III, four grievances arising out events occurring at JCF between the first incident alleged in his amended complaint and when he filed his original complaint (i.e., between January 7 and August 2, 2019):

Grievance No. (Ex. 2 Pincite)	MDOC Defendants Grieved at Step I	Issue Grieved at Step I	Grievance Outcome
JCF-19-05-0960-28b (88–92)	None	Has two details for bunk restrictions where the issues are permanent and should be treated as special accommodations and not as temporary details	Rejected at Step I as vague as to what the main issue is or who is being grieved; rejection affirmed through Step III
JCF-19-05-0876-27b (93–99)	Elum	Denied sufficient paper and carbon paper	Rejected at Step I for as grieving contents of policy or procedure (grievant directed to go to Warden's Forum); rejection affirmed through Step III
JCF-19-05-0933-27b (100–104)	None	Denied special accommodation for a specific typewriter model	Rejected at Step I for as grieving contents of policy or procedure (grievant directed to go to Warden's Forum); rejection affirmed through Step III
JCF-19-03-0396-12i1 (105–109)	None	Failure to provide listed accommodations (heating pad, no stairs, elevators, wheelchair cushion, foam mattress pad, handicap	Denied at Step I; denial affirmed through Step III

		ramp, bunk with 24 inches head room, bunk with 30x48 clear floor space for transport, cell with 60 inch drawer clear floor space, aid to clean cell, aid to move foot lockers, reach arm for dropped items, and cupholder)	
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ARGUMENT

I. Standard of Review

Summary judgment is appropriate if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In deciding a summary judgment motion, this Court draws all justifiable inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Christian v. Belcher*, 888 F.2d 410, 413 (6th Cir. 1989). The moving party has the burden of showing the absence of genuine factual disputes from which a reasonable jury could return a verdict for the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986). In considering whether summary judgment is appropriate, this Court must “look

beyond the pleadings and assess the proof to determine whether there is a genuine need for trial.” *Sowards v. Loudon Cnty.*, 203 F.3d 426, 431 (6th Cir. 2000).

II. Plaintiffs failed to exhaust administrative remedies on their claims.

A prisoner-plaintiff no longer has to plead or demonstrate exhaustion to satisfy the PLRA requirements of 42 U.S.C. § 1997e(a). Now, failure to exhaust administrative remedies is an affirmative defense that must be raised by a defendant. *Jones v. Bock*, 549 U.S. 199 (2007). Under 42 U.S.C. § 1997e(a), a prison inmate cannot maintain a civil rights action with respect to prison conditions brought under any federal law if he did not first exhaust all available administrative remedies.

The Supreme Court has held that exhaustion requires proper exhaustion, which means that the prisoner must complete the administrative review process. *Woodford v. Ngo*, 548 U.S. 81, 88 (2006). “[P]roper exhaustion of administrative remedies . . . means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).” *Id.* at 90 (quotation

omitted). Exhaustion of administrative remedies is a prerequisite to filing a prisoner lawsuit challenging prison conditions. 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, 524 (2002). “The plain language of the statute makes exhaustion a precondition to filing an action in federal court.” *Nussle*, 534 U.S. at 523. Exhaustion is an issue that must be determined before the Court can review the merits of the plaintiff’s claims and the remaining defenses raised by defendants.

The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons, and thus seeks to “affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.” *Id.* at 525. The PLRA also was intended to “reduce the quantity and improve the quality of prisoner suits.” *Id.* at 524.

Requiring proper exhaustion serves all of these goals. It gives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors. *Ngo*, 548 U.S. at 94. This is important in relation to prison systems because it is “difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately

bound up with state laws, regulations, and procedures, than the administration of its prisons.” *Preiser v. Rodriguez*, 411 U.S. 475, 491–92 (1973). Thus, it is essential for a plaintiff to properly exhaust his administrative remedies before filing suit by filing a grievance that complies with the prison grievance system regarding the allegations made in his complaint.

An untimely grievance, or otherwise improperly filed grievance, even though appealed through all steps of a grievance procedure, does not fulfill the exhaustion requirement of 42 U.S.C. § 1997e(a).

Permitting an untimely or otherwise improperly filed grievance, even though appealed through all steps, to satisfy § 1997e(a)’s requirement “would permit a prisoner to bypass deliberately and flagrantly administrative review without any risk of sanction.” *Ngo*, 548 U.S. at 97. The *Ngo* Court explained:

A prisoner who does not want to participate in the prison grievance process will have little incentive to comply with the system’s procedural rules unless noncompliance carries a sanction For example, a prisoner wishing to bypass available administrative remedies could simply file a late grievance without providing any reason for failing to file on time. If the prison then rejects the grievance as untimely, the prisoner could proceed directly to federal court. And acceptance of the late grievance would not thwart the prisoner’s wish to bypass the administrative process; the

prisoner could easily achieve this by violating other procedural rules until the prison administration had no alternative but to dismiss the grievance on procedural grounds. We are confident that the PLRA did not create such a toothless scheme.

Id. at 95. “The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.” *Jones*, 549 U.S. at 219.

The administrative process applicable to Ryan’s grievable claims is governed by MDOC Policy Directive 03.02.130, “Prisoner/Parolee Grievances.” Ryan’s complaint alleges incidents which are covered by two versions of P.D. 03.02.130 (effective dates July 09, 2007, and March 18, 2019), and the differences between the two versions are immaterial for the purposes of this motion. The more recent version of P.D. 03.02.130 states, in pertinent part, as follows:

F. Grievances may be submitted regarding alleged violations of policy or procedure or unsatisfactory conditions of confinement that personally affect the grievant, including alleged violations of this policy and related procedures.

* * *

Q. Prior to submitting a written grievance, the grievant shall attempt to resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue, unless prevented by circumstances beyond

his/her control or if the issue is believed to fall within the jurisdiction of Internal Affairs. If the issue is not resolved, the grievant may file a Step I grievance. The Step I grievance must be filed within five business days after the grievant attempted to resolve the issue with appropriate staff.

* * *

T. Grievances and grievance appeals at all steps shall be considered filed on the date received by the Department. All grievances and appeals shall be date stamped upon receipt. . .

* * *

W. Within five business days after attempting to resolve a grievable issue with staff, a grievant wishing to advance a grievance must send a completed Prisoner/Parolee Grievance form (CSJ-247A) to the Step I Grievance Coordinator designated for the facility or other office being grieved. . . .

X. The Grievance Coordinator shall log and assign a unique identifying number to each Step I grievance received, including those that may be rejected. A computerized grievance tracking system shall be used for this purpose.

Y. After receipt of the grievance, the Grievance Coordinator shall determine if the grievance should be rejected pursuant to this policy. If the grievance is rejected, the grievance response shall state the reason for the rejection without addressing the merits of the grievance. . . .

* * *

DD. A grievant may file a Step II grievance if s/he is dissatisfied with the response received at Step I or if s/he did not receive a timely response. To file a Step II grievance, the grievant must request a Prisoner/Parolee Grievance Appeal (CSJ-247B) from the Step I Grievance Coordinator and send

the completed form to the Step II Grievance Coordinator designated for the facility, field office, or other office being grieved within ten business days after receiving the Step I response or, if no response was received, within ten business days after the date the response was due, including any extensions. If the office being grieved does not have a designated Grievance Coordinator, the grievant is to send the grievance to the Step II Grievance Coordinator for the facility in which s/he is housed.

EE. The Grievance Coordinator shall log each Step II grievance received, including those that may be rejected. The Grievance Coordinator shall use a computerized grievance tracking system to do so. The Grievance Coordinator shall determine if the grievance should be rejected pursuant to this policy. If the grievance is rejected, the grievance response shall state the reason for the rejection without addressing the merits of the grievance. If accepted, the Grievance Coordinator shall assign an appropriate respondent and indicate the date by which the response is due. The due date shall be within 15 business days after receipt of the grievance, unless an extension is granted as set forth in Paragraph T.

* * *

HH. A grievant may file a Step III grievance if s/he is dissatisfied with the Step II response or does not receive a timely response. To file a Step III grievance, the grievant must send a completed Prisoner/Parolee Grievance Appeal form (CSJ-247B) to the Grievance Section within ten business days after receiving the Step II response or, if no response was received, within ten business days after the date the response was due, including any extensions.

II. The Grievance Section shall be the respondent for Step III grievances on behalf of the Director. Each grievance received at Step III, including those that may be rejected, shall be logged on a computerized grievance tracking system.

The tracking system shall include information on the subject matter of each grievance received and, for rejected grievances, the basis for the rejection. The Grievance Section shall forward grievances regarding clinical issues to the Administrator of the BHCS. The BHCS Administrator shall ensure the referred grievance is investigated and a response is provided to the Grievance Section in a timely manner. The Manager of the Grievance Section shall ensure that any additional investigation is completed as necessary for each Step III grievance accepted, including referral to the Internal Affairs and, for disability issues, to the Equal Employment Opportunity Office, as appropriate, and that a copy of the Step III response is provided to the grievant. Generally, Step III responses will be responded to within 60 business days. The Step III response is final.

Here, Ryan's Step III Grievance Report shows that he had pursued, through Step III, four grievances arising out of incidents occurring at JCF between January 7 and August 2, 2019. For the reasons discussed below, none of these four grievances exhausted any of the claims asserted in the amended complaint.

In the Step I grievance for JCF-19-05-0960-28b (JCF-0960), it appears that Ryan was complaining that he received two temporary details where he should have received a special accommodation. (Ex. at 91.) Ryan did not name any MDOC Defendants (or anybody else) as individuals being grieved, and MDOC rejected the Step I grievance as vague as to who was being grieved (Ex. 2 at 92); the rejection was then

affirmed through Step III (Ex. 2 at 88). Accordingly, because JCF-0960 was rejected and MDOC did not reach a decision on its merits at any step of the grievance process, it did not exhaust any claims asserted in Ryan's complaint. Moreover, even if Ryan were to argue that the rejection of JCF-0960 was improper and this Court agreed, it still would not exhaust any claims against any MDOC Defendants because it did not name any of them as individuals being grieved at Step I.

In the Step I grievance for JCF-19-05-0876-27b (JCF-0876), Ryan alleged that Librarian Elum was denying him sufficient paper and carbon paper. (Ex. 2 at 96 & 98–99.) Due to safety and security reasons, MDOC P.D. 05.03.118, "Prisoner Mail,"¹ limits the type and amount of supplies a prisoner may possess for litigation purposes. Because Ryan was grieving the policy limits on paper supplies a prisoner may possess, MDOC rejected the Step I grievance as grieving the contents of MDOC P.D. 05.03.118 ¶¶ H & I, and directed Ryan to go to the Warden's Forum. (Ex. 2 at 97.) Ryan disagreed with the characterization of his grieved issue as a Warden's Forum issue in his

¹ Current version available online at: https://www.michigan.gov/documents/corrections/05_03_118_645850_7_WITH_NOTICE_669194_7.pdf (last visited Sept. 20, 2021).

Step II appeal (Ex. 2 at 94), and there is no record that Ryan went to the Warden's Forum to raise his complaints regarding MDOC's limitations on supplies. The Step I rejection was subsequently affirmed through Step III (Ex. 2 at 88). Accordingly, because JCF-0876 was rejected and MDOC did not reach a decision on its merits at any step of the grievance process, it did not exhaust any claims asserted in Ryan's complaint. Moreover, even if Ryan were to argue that the rejection of JCF-0876 was improper and this Court agreed, it would exhaust Ryan's denial-of-supplies claims against only Elum because she was the only individual named and grieved at Step I.

Similarly, in the Step I grievance for JCF-19-05-0933-27b (JCF-0933), Ryan alleged that he was denied a special accommodation for a specific typewriter model; notably, Ryan did not name any individuals being grieved at Step I. (Ex. 2 at 103.) Due to safety and security reasons, MDOC P.D. 04.07.112, "Prisoner Personal Property,"² limits the model of typewriter a prisoner may possess. Because Ryan's requested model is not among the approved models, Ryan was

² Current version available online at https://www.michigan.gov/documents/corrections/04.07.112_combined_723389_7.pdf (last accessed Sept. 20, 2021).

effectively grieving the policy which disallowed him from possessing the requested model, so MDOC rejected the Step I grievance as grieving the contents of MDOC P.D. 04.07.112 ¶ Q, and directed Ryan to go to the Warden's Forum. (Ex. 2 at 104.) Ryan disagreed with the characterization of his grieved issue as a Warden's Forum issue in his Step II appeal (Ex. 2 at 101), and there is no record that Ryan went to the Warden's Forum to raise his complaints regarding MDOC's limitations on supplies. The Step I rejection was subsequently affirmed through Step III (Ex. 2 at 104). Accordingly, because JCF-0933 was rejected and MDOC did not reach a decision on its merits at any step of the grievance process, it did not exhaust any claims asserted in Ryan's complaint. Moreover, even if Ryan were to argue that the rejection of JCF-0933 was improper and this Court agreed, it still would not exhaust any claims against any MDOC Defendants because it did not name any of them as individuals being grieved at Step I.

Last, in the Step I grievance for JCF-19-03-0396-12i1 (JCF-0396), Ryan alleged that he was denied a list of special accommodations; notably, Ryan did not name any individuals being grieved at Step I. (Ex. 2 at 108.) MDOC denied the grievance at Step I, and affirmed the

denial through Step III. (Ex. 2 at 105–109.) Although MDOC did reach a decision on the merits of Ryan’s grievance at each step of the grievance process, JCF-0396 did not exhaust any claims asserted in Ryan’s complaint because it did not name any of the MDOC Defendants as individuals being grieved at Step I.

If the exhaustion prerequisite of the PLRA is to have any meaning, it must carry sanctions for noncompliance with administrative procedural requirements. *Ngo*, 548 U.S. at 95. Here, prior to filing suit challenging the conditions from which this lawsuit arose, the PLRA required that Ryan exhaust his administrative remedies regarding those conditions or actions. *Nussle*, 534 U.S. at 523. Moreover, the PLRA requires that Ryan comports with all of MDOC’s procedural requirements in order to properly exhaust administrative remedies. *Ngo*, 548 U.S. at 95. But Ryan failed to exhaust properly any claims asserted in his complaint against MDOC Defendants. Ryan’s failure to present properly his claims against MDOC Defendants in the grievance procedure prevented MDOC from addressing and reviewing these claims on the merits. *Ngo*, 548 U.S. at 90, 92. Accordingly, Ryan failed to complete the administrative review process regarding his

claims against MDOC Defendants and cannot now present them in this Court. *Id.* at 88; *Nussle*, 534 U.S. at 523. This Court should therefore dismiss the unexhausted claims and dismiss this lawsuit in its entirety.

CONCLUSION AND RELIEF REQUESTED

Plaintiff Sean Ryan has failed to exhaust administrative remedies on his claims against MDOC Defendants. This Court should therefore grant summary judgment in MDOC Defendants' favor, dismiss the unexhausted claims, and dismiss this lawsuit in its entirety.

Respectfully submitted,

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